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BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of
Teresa Wheatley, *et al.*

2016 AUG 19 PM 3:48
MUR 6761

2016 AUG 19 PM 3:39
SENSITIVE
CELA

GENERAL COUNSEL'S REPORT #2

9 I. ACTIONS RECOMMENDED

10 Find reason to believe that Teresa Wheatley violated 52 U.S.C. § 30122, approve the
11 attached Factual and Legal Analysis, authorize pre-probable cause conciliation, and approve the
12 attached proposed Conciliation Agreement.

13 II. BACKGROUND

14 Dewhurst for Texas ("DFT") filed the Complaint in this matter, which alleged, among
15 other things, that Kenneth A. "Buddy" Barfield, while serving as DFT's campaign manager and
16 assistant treasurer, used fraudulent invoices from his consulting firm, Alexander Consulting
17 Group, LLC ("AGC"), to embezzle approximately \$1.2 million from DFT.¹ The Complaint also
18 alleged that Teresa Wheatley, Barfield's administrative assistant, contributed \$5,000 to DFT in
19 her own name with funds that Barfield transferred to her from AGC's account for that purpose.²

20 On May 19, 2015, the Commission found reason to believe that Barfield violated
21 numerous provisions of the Federal Election Campaign Act of 1971, as amended ("Act"), and
22 authorized an investigation.³ At the time that the Office of the General Counsel ("OGC") made
23 its recommendations, the available record did not indicate Wheatley's level of involvement in the

¹ See Compl. at 1 (Nov. 4, 2013). The Complaint is a resubmission of a previous *sua sponte* submission that the Committee filed on July 31, 2013, describing Barfield as the respondent and alleging that he violated the law. See Letter from Curt E. Beck, Asst. Treasurer, Dewhurst for Texas, to Jeff S. Jordan, Asst. Gen. Counsel, Fed. Election Comm'n (Nov. 4, 2013).

² Compl. at 12; see *id.*, Exs. J-1 to J-3.

³ See Certification, MUR 6761 (Barfield, *et al.*) (May 21, 2015).

1 alleged contributions in the name of another.⁴ Accordingly, OGC did not seek to add her as a
2 Respondent and notify her of the Complaint.⁵

3 As part of its ensuing investigation, OGC obtained documents
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5 ⁶ With respect to Wheatley, the documents appeared to show that
6 she, not Barfield, directed the transfer of \$5,000 from AGC's bank account to her account prior
7 to making contributions to DFT in her own name.⁷ Because Wheatley therefore may have
8 violated Section 30122 of the Act, OGC recommended that the Commission add Wheatley as a
9 Respondent in this matter and notify her of the Complaint.⁸ The Commission approved OGC's
10 recommendation on February 25, 2016.⁹ OGC notified Wheatley of the allegations, provided her
11 with a copy of the Complaint and the attachments to it that related to her alleged violations, and
12 afforded her the opportunity to respond.¹⁰ To date, Wheatley has not responded to the
13 allegations.

⁴ DFT interviewed Wheatley as part of its internal investigation, and asserted, based on her statement, that Barfield directed the \$5,000 to Wheatley's personal account before she contributed those funds to DFT. Wheatley indicated that Barfield had transferred \$5,000 from AGC to her account because DFT lacked sufficient funds to pay a vendor, and she then contributed those funds to DFT. *See* Compl. at 12.

⁵ *See* First Gen. Counsel's Report, MUR 6761 (Barfield, *et al.*) (June 5, 2014).

⁶ When OGC began its investigation, Barfield had already been criminally convicted for violating several provisions of the Act, including 52 U.S.C. § 30114(b), and had been sentenced to serve eighty seven months in federal prison. *See* Letter from E.G. Morris, Counsel to Kenneth A. Barfield, to Tracey Ligon, Attorney, Fed. Election Comm'n (June 5, 2015).

⁷ *See infra* note 15, 17, 18 and related text (discussing specific documents).

⁸ *See* Memorandum to the Comm'n from Kathleen Guith, Acting Assoc. Gen. Counsel, and William Powers, Asst. Gen. Counsel, MUR 6761 (Barfield, *et al.*) (Jan. 22, 2016). OGC also recommended that the Commission add other parties as Respondents in this matter, including DFT and David Dewhurst. The Commission did not adopt those recommendations.

⁹ *See* Amended Certification, MUR 6761 (Barfield, *et al.*) (Mar. 31, 2016).

¹⁰ Letter from Jeff S. Jordan, Asst. Gen. Counsel, Fed. Election Comm'n, to Teresa Wheatley (Apr. 21, 2016).

III. ANALYSIS

A. Legal Standard

Under the Act, a contribution includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."¹¹ The Act prohibits a person from making a contribution in the name of another person, knowingly permitting his or her name to be used to effect such a contribution, or knowingly accepting such a contribution.¹² The Commission's regulations also provide specific illustrations of activities that constitute making a contribution in the name of another, which include "Giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made."¹³

B. The Available Facts Indicate that Wheatley Violated 52 U.S.C. § 30122

The available facts indicate that Wheatley violated Section 30122 when she personally directed the transfer of \$5,000 from AGC's bank account to her personal account, and then contributed those funds to DFT in her own name. AGC's bank account summary sheet shows a wire transfer of \$5,000 from AGC's account to Wheatley's account on November 27, 2012.¹⁴ In the subject line, the account summary states "For Contribution." Wheatley's personal bank

¹¹ 52 U.S.C. § 30101(8)(A); 11 C.F.R. § 100.52.

¹² 52 U.S.C. § 30122.

¹³ 11 C.F.R. § 110.4(b)(2)(i).

¹⁴ See Compl. Exh. J-2.

1 account also reflects an incoming wire transfer of \$5,000 that posted on November 28, 2012.¹⁵

2 DFT received \$5,000 in contributions from Wheatley on November 27, 2012.¹⁶

3 Crucially, an email between Wheatley and Wells Fargo Bank, which serviced AGC's
4 account, indicates that Wheatley directed that \$5,000 be transferred from AGC's account at
5 Wells Fargo to her personal account at Chase Bank.¹⁷ Wheatley also wrote herself a \$50.00

6 check, dated November 29, 2012, on AGC's account to cover fees associated with the wire

7 transfer: the subject line of that check indicates that it is for "Reimbursement Banking Fees."¹⁸

8 These documents establish that Wheatley was not merely a passive "straw man" in a conduit

9 contribution scheme, but was directly involved in transferring funds from the true contributor to

10 herself prior to making contributions in her own name. While we acknowledge that Wheatley, as

11 Barfield's administrative assistant, could have been acting on Barfield's instructions or with his

12 authorization, the available record does not provide any specific support for that inference and, in

13 any event, Wheatley's involvement appears to have gone beyond that of a low-level employee

¹⁵ See Wheatley JP Morgan Chase Bank Account Summary, 20_AGC LLC_WF 2012_T.pdf at 18.

¹⁶ See Dewhurst for Texas 2012 Year-End Report at 8 (Jan. 31, 2013).

¹⁷ See Email from Teresa Wheatley to Wells Fargo Bank (Nov. 27, 2012), 20_AGC LLC_WF 2012_T.pdf at 15. The email includes an attachment titled "TW JP Morgan Chase.docx" and the text of the email reads, in full:

"This is request that you do a wire transfer in the amount of \$5,000 to the attached account of Teresa Wheatley from our Alexander Group account ending in 4191.

Please let me know if you have any questions.

Thank you

Teresa Wheatley".

¹⁸ 20_AGC LLC_WF 2012_T.pdf at 17. Wheatley's account summary appears to show that she was charged a \$15.00 "Incoming Domestic Wire Fee" and a \$34.00 "Returned Item Fee for an Unpaid Check #6130 in the Amount of \$5,000." Handwritten in the margin of the printed account summary page for Wheatley's personal account, there is a note that appears to read: "T: Sorry Do a Check for 50.00 Next Time we will do a check!!" Although we do not know who wrote that note in the margin, we can logically infer that Wheatley may have been authorized to reimburse herself the additional \$50.00 in fees associated with receiving the \$5,000 wire transfer for the DFT contributions.

1 performing a ministerial task.¹⁹ Accordingly, we recommend that the Commission take
2 enforcement action under these circumstances.

3 Although the available facts could potentially support a finding that Wheatley knowingly
4 and willfully violated Section 30122 of the Act, we do not recommend that the Commission
5 make such a finding here. A knowing and willful finding is appropriate when an individual acts
6 "with full knowledge of all the relevant facts and [recognizes] that the action is prohibited by
7 law."²⁰ The record does not indicate whether Wheatley recognized that her conduct was illegal.
8 Moreover, Wheatley apparently was not involved in either devising or concealing the conduit
9 contribution scheme.²¹ She also appears to have cooperated with DFT's own investigation into
10 Barfield's conduct. Accordingly, the record does not establish a definitive basis to make a
11 knowing and willful finding.

¹⁹ In prior matters, we have recommended that the Commission not proceed with enforcement action against lower-level corporate officers, employees, spouses, and family members. *See, e.g.*, Gen. Counsel's Report #2 at 31–36, MUR 6454 (Anchin, Block & Anchin LLP, *et al.*). Wheatley, however, appears to have been more directly involved in the conduit contributions in this matter. Moreover, Barfield's role remains unclear: investigative documents plainly undermine the notion that Barfield transferred the funds to Wheatley's account before she contributed them to DFT, and Wheatley did not clarify the record on this point after receiving notice of the complaint and an opportunity to respond to the allegations. The available record, therefore, indicates only that Wheatley transferred the funds from AGC's account to her personal account before making the contributions to DFT; Barfield's level of involvement in the scheme, if any, remains unclear.

²⁰ 122 Cong. Rec. 12197, 12199 (May 3, 1976); *see United States v. Danielczyk*, 917 F. Supp. 2d 573, 579 (E.D. Va. 2013) (quoting *Bryan v. United States*, 524 U.S. 184, 195 (1998) (holding that government needs to show only that the defendant acted with knowledge that conduct was unlawful, not knowledge of specific statutory provision violated, to establish a willful violation)).

²¹ *See* Gen. Counsel's Report #2 at 8, MUR 6465 (Fiesta Bowl, *et al.*) (July 18, 2012); Certification, MUR 6465 (finding reason to believe that intermediary knowingly and willfully violated then-section 441 f) (Nov. 14, 2012); Gen. Counsel's Report #2 at 31, MUR 6454 (Anchin, Block & Anchin LLP, *et al.*) ("Snapper . . . was the only conduit who testified that he knew that reimbursing contributions in the name of others was unlawful."); *see also United States v. Hopkins*, 916 F.2d 207, 215 (5th Cir. 1990) (indicating that a knowing and willful finding can be proven with evidence "that the defendant acted deliberately and with knowledge" that their conduct was illegal; an inference of knowing and willful conduct may be drawn "from the defendant's elaborate scheme for disguising" his or her actions").


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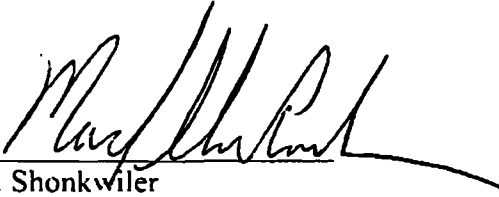
13 **V. RECOMMENDATIONS**

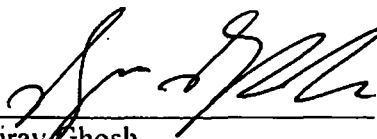
- 14 1. Find reason to believe that Teresa Wheatley violated 52 U.S.C. § 30122;
- 15 2. Approve the attached Factual and Legal Analysis;
- 16 3. Authorize conciliation prior to a finding of probable cause;
- 17 4. Approve the attached proposed Conciliation Agreement; and

5. Approve the appropriate letters.

Date: 8-19-16


Kathleen Guith
Acting Associate General Counsel for Enforcement


Mark Shonkwiler
Assistant General Counsel


Saurav Ghosh
Attorney